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No.

IN THE

Supreme Court of the United States

DR. KIRSTEN KNUDSEN, CHRIS BAKER AND VIKKI BAKER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PETITIONERS

v.

LIBERTY MUTUAL INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a state court order certifying an amended class of plaintiffs the "commencement" of a new action under the Class Action Fairness Act of 2005 ("CAFA") for purposes of allowing a defendant to remove the case to federal court where the state court class action was begun in 2000, CAFA does not apply to any civil action commenced before February 18, 2005, and this Court's decisions make clear that members of a class can be determined at any time subsequent to the filing of the complaint without risking the "commencement" of new litigation?

2. Did the court of appeals ignore Congress' intent in enacting CAFA by holding that because an amended class certification could subject the respondent to more liability than when the complaint was first filed, it is the "commencement" of fresh litigation under CAFA entitling the respondent to remove the action to federal court?

3. Where respondent's deliberate and fraudulent 5-year "shell game" in state court to avoid disclosing its true identity as a party has been so evasive and obfuscatory that no discovery ever took place and that ultimately contempt and default judgments were entered against it, should it now—even though still in contempt of state court discovery orders---be entitled to remove the action to federal court under CAFA where the federal district court now must give no weight at all to the state court's default judgment or the respondent's contumacious conduct which justified it?

4. Are public policies, notions of comity and a pragmatic federalism undermined by the decision below which

usurps a state court's power to enforce its own judgments and rewards a recalcitrant and contumacious defendant with a federal forum where it can shed the default judgment entered against it in state court and renew its fraudulent "shell game" concerning its true identity?

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The published opinion of the United States Court of Appeals for the Seventh Circuit in *Kirsten Knudsen, Chris Baker and Vikki Baker v. Liberty Mutual Insurance Company* (C.A. No. 05-8037),decided January 27, 2006, and reported at 435 F. 3d 755(7th Cir.2006)("*Knudsen II*"), granting the petition for leave to appeal and vacating the District Court's order remanding the case to state court, is set forth in the Appendix hereto(App. 1-8).

The published opinion of the United States Court of Appeals for the Seventh Circuit in *Kirsten Knudsen, Chris Baker and Vikki Baker v. Liberty Mutual Insurance Company* (C.A. No. 05-8010),decided June 7, 2005, and reported at 411 F. 3d 805(7th Cir.2005)("*Knudsen I*"), denying the petition for leave to appeal thereby affirming the District Court's order remanding the case to state court, is set forth in the Appendix hereto(App. 9-14)

The unpublished Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division, in *Dr. Kirsten Knudsen, P.C. and Chris Baker and Vikki Baker v. Liberty Mutual Insurance Company*,(Civil Action No. 05-C-5924), decided December 13, 2005, granting the petitioners' motion to remand the case to state court for lack of federal jurisdiction, is set forth in the Appendix hereto(App. 15-26).

The unpublished order of the United States Court of Appeals for the Seventh Circuit in *Kirsten Knudsen, Chris Baker and Vikki Baker v. Liberty*

Mutual Insurance Company(C.A. No. 05-8037), decided February 22, 2006, denying the petitioners' timely filed petition for rehearing and rehearing *en banc*, is set forth in the Appendix hereto(App. 27-28).

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit granting the petition for leave to appeal and vacating the District Court's order remanding the case to state court, was entered on January 27, 2006; and its order denying the petitioner's timely filed petition for rehearing was filed on decided on February 22, 2006(App.1;27).

This petition for writ of certiorari is filed within ninety (90) days of the date of the court of appeals' denial of the petitioner's timely filed petition for rehearing and rehearing *en banc*. 28 U.S.C. Section 2101(c). Revised Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

RELEVANT PROVISIONS INVOLVED(see Appendix)

STATEMENT

On March 13, 2000, the petitioner Dr. Kirsten Knudsen, P.C., on behalf of herself and all other persons and entities similarly situated("the petitioners"), brought this national civil class action complaint against the respondent Liberty Mutual Insurance Company("Liberty"), a Massachusetts corporation, in the Chancery Division of the Circuit Court of Cook

County in Chicago, Illinois. The thrust of the petitioners' complaint was that Liberty employs a computerized cost containment program using a database which systematically and wrongly reduces its payment of medical bills submitted for reimbursement either by Liberty's insureds or by health care providers who have treated Liberty's insureds.

Dr. Knudsen's claim is typical of the class. Her patient stated that his medical expenses were being handled by Liberty and he gave her Liberty's phone number in Schaumburg, Illinois. Dr. Knudsen called the number and spoke to Liberty's adjuster who verified coverage, the patient's claim and claim number and then told her where to send her bills. After Dr. Knudsen treated the patient and billed Liberty for the care she rendered, the sum she eventually received was unilaterally reduced by Liberty and it refused to pay the full amount billed even though Dr. Knudsen's charges were customary for similar medical treatment within the same geographic area.

Asserting that Liberty's use of this database is a breach of contract and violation of the Illinois consumer fraud statutes as well as analogous statutory schemes in other states where Liberty does business, the petitioners sought class certification and the award of damages to both the named plaintiff and the putative class of plaintiffs for the medical expenses Liberty wrongly refused to pay "for a period of ten years prior to the date of filing of this complaint to present." In an amended complaint filed on March 15, 2001, the petitioners refined their claims, added a third count seeking declaratory relief and continued to identify as actionable Liberty's use of a computer database which

systematically applied inaccurate fee schedules to reduce its payout of medical bills for its insureds regardless of what line of Liberty's business generated these medical bills or what policy of Liberty was involved.

The amended complaint further defined the class to be certified as

> all LIBERTY insureds, their third party beneficiaries and their assignees who are entitled to payment of medical bills under any medical payments coverages pursuant to a LIBERTY insurance policy, and who have received a payment from LIBERTY for less than the medical charge, based upon the application of LIBERTY'S medical cost and utilization database.

The petitioners' amended complaint defining this class and the actionable conduct for which they sought redress was *not* directed to any specific subsidiary company of Liberty. Instead, they alleged generally that "*Liberty* has knowingly and intentionally engaged in such practices for the purpose of reducing *its* overall claims ratio and payments expenditures" and that "*Liberty's* medical claims database is designed solely to reduce the level of medical benefit reimbursement."

The petitioners adopted this open-ended description of the respondent Liberty because they knew from their examination of Liberty's required annual filings with the Departments of Insurance in states where it does business that Liberty files one such statement with those departments on behalf of all of its operating subsidiaries and one federal income tax

return for all of its companies; its board of directors make all investment decisions for all of its subsidiary companies; and almost all of the employees of Liberty's subsidiaries are also employees of the parent Liberty. Even Liberty's counsel conceded during one oral argument that "a separate company" houses all of Liberty's subsidiaries. The petitioners' attorneys accordingly looked forward to discovery in state court in order to identify Liberty Mutual Insurance Company (or some other entity) as (1) the parent holding company of all of Liberty's subsidiaries;(2) the entity which controls all corporate policies for the shell subsidiaries; and therefore (3) the appropriate class defendant who employs the offending computer database to deny full payment of medical claims for Liberty's insureds and those of its shell subsidiaries.

In appearing and answering the petitioners' complaint and amended complaint, Liberty never claimed that it was wrongly sued or that it was an improper party; and it *never once* in its answers, affirmative defenses or other pleadings denied the petitioners' individual allegations that it was the party responsible for denying full payment of Dr. Knudsen's bill for her medical services or their class allegations that it denied full payment of medical bills for other beneficiaries of Liberty policies issued by its subsidiaries.

However, the petitioners' discovery in state court as to their class allegations as well as to the merits of their complaint proved chimerical. Even though they issued multiple interrogatories and requests for production of documents upon Liberty seeking to identify the dimensions of Liberty's

responsibility for its use of the offending computer database to deny full payment of medical claims for Liberty's insureds and for those of its shell subsidiaries or companies, Liberty repeatedly failed to respond in any respect, refusals which prompted numerous motions to compel by the petitioners and which eventually resulted in a finding of contempt against Liberty for its repeated and obstinate failure to provide discovery.

After some parties-plaintiffs (Chris and Vikki Baker) from another national civil class action in the State of Washington alleging identical claims were allowed to intervene as additional class representatives and more than three years after this lawsuit was brought with no discovery having taken place because of Liberty's failure to respond to any of the petitioners' discovery requests, Liberty moved to dismiss the petitioners' complaint on August 13, 2003. It asserted that the insurance policies giving rise to their claims were not issued by Liberty Mutual Insurance Company as alleged "but by an entirely separate corporation, Liberty Mutual *Fire* Insurance Company("Liberty Fire")." It therefore claimed that the court lacked subject jurisdiction since Liberty Fire, a separate and distinct company, had not been named as a party to this action, had not been served and had not entered an appearance.

The petitioners opposed Liberty's motion arguing *inter alia* that the motion judge should not even entertain Liberty's motion since their own pending motions for sanctions and the entry of default judgment against Liberty for discovery abuses take precedence; that Liberty waived its right to claim that

it was an incorrect defendant by answering the complaints as the correct defendant and then by obstinately refusing to provide discovery on this very question; and that its continuing contumacious conduct in refusing to provide discovery deprived it of the right to be heard on its motion.

On March 26, 2004, the Circuit Court for Cook County, Nowicki, J., issued a memorandum order and opinion denying Liberty's motion to dismiss, entering a default judgment against it for its repeated discovery abuses and striking its answer and affirmative defenses. *Knudsen v. Liberty Mutual Insurance Company*, 2004 WL 625679(Ill.Cir.2004). She found that Liberty made knowing, deliberate and bad faith misrepresentations in its pleadings concerning its standing as the correct defendant in this suit, stalled the petitioners' discovery in order to have the statute of limitations run on the petitioners' claim against the nominally "correct" defendant and then moved to dismiss for lack of "standing" once it became clear that discovery sanctions against it were imminent. As Judge Nowicki concluded, Liberty refused to comply *with at least six* of the Court's orders requiring it to provide responses to the petitioners' discovery requests. She found that

> [w]ith the passage of each successive year, this Court has become increasingly shocked by Liberty's casual attitude towards its discovery abuses and this Court's authority....The egregious behavior demonstrated by Liberty is sufficient to impose a default as an appropriate sanction against Liberty.

> ....What has occurred in this matter is that Liberty's actions in stringing out its discovery compliance have allowed [it] to effectively lay in wait until the statute of limitations has run on what it considers to be the appropriate defendant in the matter. It was not until [discovery] sanctions appeared imminent that Liberty decided to defend on the basis of standing, an issue that it has kept well hidden by its false pleadings. These conclusions by the Court as to Liberty's intent are substantiated by the fact that Liberty has never filed an affirmative defense as to standing in the four years this case has been proceeding, nor the simplest of motions for summary judgment pointing out that the [petitioners] have not named the correct defendant. Given the intent behind Liberty's abuses and violations, this Court finds that Liberty has demonstrated a deliberate disregard for this Court's authority.

Id. at 2004 WL 625683.

In the wake of this ruling, the petitioners moved for an order from the Circuit Court of Cook County that this civil action satisfied the prerequisites of a class action under Illinois law and certifying the class of plaintiffs to be

> [a]ll LIBERTY MUTUAL INSURANCE COMPANY and *LIBERTY FIRE INSURANCE COMPANY* insureds, their third party beneficiaries and their assignees who submitted medical bills under any medical payments coverages pursuant to a Liberty

> Mutual or Liberty Fire insurance policy, and whose claims were paid for less than the medical charge, based upon the application of a medical cost and utilization database.

However, twelve days before the hearing in state court on the petitioners' class certification motion scheduled for April 11, 2005, and in order to shed itself of the default judgment which had entered against it because of its pervasive discovery abuses, Liberty removed the case to the federal district court relying upon the provisions of the Class Action Fairness Act of 2005("CAFA"), 28 U.S.C. Sections 1332(d) and 1453, contending that this new class certification amounted to "commencing" a new action, entitling it to removal under CAFA.

The Federal District Court for the Northern District of Illinois, Eastern Division, Castillo, J., promptly sent it back to the Illinois state courts, granting the petitioners' motion to remand the matter, stating in open court that the amendment of the class definition entertained by the state courts did not amount to the "commencement" of a new action; that the "new" class definition was completely consistent with the class which had been proposed throughout the litigation; and that "the only one that's trying to create federal jurisdiction in this case is some creative lawyers on the part of [Liberty]."

The Court of Appeals for the Seventh Circuit denied Liberty's petition to appeal and affirmed Judge Castillo's ruling. *Kirsten Knudsen, Chris Baker and Vikki Baker v. Liberty Mutual Insurance Company*, 411 F. 3d 805(7th Cir. 2005)("*Knudsen I*")(App. 9-14).

The court, speaking through Circuit Judge Easterbrook, agreed with the Tenth Circuit Court of Appeals in *Pritchett v. Office Depot, Inc.*, 404 F.3d 1232(2005), that Section 9 of CAFA means what it says, that CAFA applies only to suits "commenced on or after the date of enactment of this Act," i.e., February 18, 2005(App. 10). Since the petitioners' civil action against Liberty was begun in state court in March of 2000, it was commenced before CAFA's enactment and could not be removed under its provisions(*Id.*).

The court rejected Liberty's argument that any "substantial" or "significant" change in the petitioners' class definition "commences" a new case, stating that a host of significant changes in a plaintiff's claim occur all the time in the course of litigation without them beginning a "new" claim; and it rightly noted that a doctrine of "significant" or "substantial" change is too imprecise a concept to use in implementing a jurisdictional rule like the one embodied in Section 9 of CAFA (*Id.* at 11).

However, Judge Easterbrook further observed that

> "a new claim for relief (a new 'cause of action' in state practice), the addition of a new defendant, or any other step sufficiently distinct that courts would treat it as independent for limitations purposes could well commence a new piece of litigation for federal purposes even it bears an old docket number for state purposes"(*Id.* at 12).

He thought the decisional law under Fed. R. Civ. P. 15(c), for when a claim relates back to the original

complaint, would provide guidance for when a court should treat a claim as sufficiently independent to be treated as "fresh litigation"(*Id.*). Since the change in class definition here neither presented a novel claim for relief nor added a new party, Liberty was not entitled to remove the case to federal court under CAFA(*Id.*).

The court went further and measured the petitioners' proposed revised class in state court which included "all Liberty Mutual Insurance Company and *Liberty Fire Insurance Company* insureds"(*Id.* at 12-13). Ignoring entirely Liberty's five-year discovery abuses in failing to provide the petitioners with the names of all of its subsidiaries and its relationship with them, its continuing contempt of state court discovery orders which were aimed at identifying Liberty's relationship with its subsidiaries and the default judgment which had been entered against it as a result, Judge Easterbrook thought it an odd revision: not only was the name of Liberty Mutual Fire Insurance Company incomplete in the class definition (due to a scrivener's error) but also the entity known as Liberty Mutual Fire Insurance Company was not a party to the suit(*Id.* at 13).

Since the petitioners had not alleged that Liberty and Liberty Fire were alter egos with two names for just one business, making a change in the class definition unnecessary, Judge Easterbrook concluded that Liberty Fire must be a separate, distinct party and suggested that removal under CAFA might be appropriate if Liberty Mutual Fire Insurance Company should be added as a defendant(*Id.* at 13-14). In that event, Liberty Fire "could enjoy a right to remove under [CAFA], for suit *against it* would have

been commenced after February 18, 2005...But Liberty Mutual Insurance Company cannot remove five years after this suit was commenced just because a non-party corporate sibling has been mentioned in [the petitioners'] latest papers"(*Id.* at 14).

With the matter remanded to the Circuit Court for Cook County and the default judgment against Liberty fully in place as a result of its earlier discovery abuses, a hearing was held before Judge Nowicki in July of 2005 on the petitioners' motion to amend the proposed national class definition so that it included

> all insureds of Liberty Mutual Insurance Company, its affiliates and subsidiaries (collectively "Liberty Mutual"), their third party beneficiaries and their assignees who submitted medical bills covered by a Liberty Mutual insurance policy, and whose claims were paid for less than the medical charge, based upon the application of a medical cost and utilization database.

On September 29, 2005, the Circuit Court issued a memorandum and order granting the petitioners' motion for this class certification. It identified the petitioners' core claim against Liberty since the beginning of this lawsuit as its nationwide use of a computerized cost containment program which systematically and arbitrarily reduces its payment of medical bills submitted for reimbursement by Liberty's insureds or by health care providers who have treated Liberty's insureds. Since Liberty allegedly resorts to this computer program not on any individualized basis but rather systematically whenever it reimburses for

medical bills, the court concluded that there were common questions of fact and law which predominate over any individual questions of the class members.

As to whether the petitioners would adequately represent the class since each of them claims a right to medical payment under a policy issued by Liberty *Fire* rather than Liberty, the Circuit Court first noted that in order to address this argument, the petitioners submitted an amended class definition which encompasses all of Liberty's insureds as well as the insureds of its affiliates and subsidiaries. Addressing Liberty's further argument that its affiliates and subsidiaries were never given fair notice of these allegations and that the default judgment already rendered against it cannot serve as the basis for certifying the class here, Judge Nowicki referred to the unique fact of this litigation: Liberty's refusal for over five years to provide discovery and to delay----*even up to the present time*—to identify the "true defendant in this matter" has led to a "shell game" where no entity, including Liberty, took responsibility for the offending conduct; and it warranted the default judgment which now prevents Liberty from contending that its affiliates and subsidiaries were not implicated in its scheme.

In fact, because of Liberty's failure to respond to any of the petitioners' written discovery, and after more than five years since their suit was filed, the petitioners have been unable to conduct a single deposition of an employee of Liberty Mutual Insurance Group, Liberty Mutual Insurance Company or any Liberty subsidiary in order to identify the dimensions of Liberty's responsibility for its use of the offending computer database to deny full payment of medical

claims for Liberty's insureds or for the insureds of its subsidiaries. Thus the petitioners have *never* been in a position to demonstrate factually that Liberty Mutual Insurance Company, as a holding company for its shell subsidiaries including Liberty Fire, is the entity which controls all corporate policies for those shell subsidiaries, policies which include the use of a distorted, unfair computer database to deny full payment of medical claims for the insureds of Liberty and its shell subsidiaries.

According to the Circuit Court, the default caused by Liberty's gamesmanship in discovery and its refusal to identify the extent of its relationship with its affiliates and subsidiaries justified the petitioners attempting to recover from Liberty itself on behalf of its affiliates and subsidiaries. Since Liberty's affiliates and subsidiaries will not be required to pay any judgment, their constitutional right to adequate notice was not impaired. Moreover, Liberty and its affiliates filed *one* income tax return; *one* board of directors makes investment decisions for *all* the companies; and Liberty provides the office space, the employees and the adjusting for *all* of its affiliates and subsidiaries. Indeed, Liberty and its affiliates *act as one company*. Even Liberty's counsel uncharacteristically conceded during one oral argument that "a separate company" houses all of Liberty's subsidiaries.

Judge Nowicki concluded:

> Therefore, in line with this Court's prior Opinion finding Liberty in default, this Court will not allow Liberty to use its improper conduct as a means of defeating [petitioners'] class action

> claim against what Liberty states is the wrong defendant and finds that [petitioners] amended class definition is sufficient and encompasses [petitioners] as adequate class representatives. To find otherwise would render this Court's default against Liberty meaningless.

Following up on this ruling, the Circuit Court, on October 14, 2005, entered an order setting up a schedule for completing discovery on the issue of damages and costs due from Liberty on the petitioners' claims.

On the same day, October 14, 2005, Liberty removed this case once again to the Federal District Court for the Northern District of Illinois, Eastern Division, pursuant to CAFA contending that Judge Nowicki's order of September 29, 2005, certifying the petitioners' amended class had "commenced" a new action by adding new claims and alleging new conduct against Liberty and its subsidiaries and affiliates which do not "relate back" to their original complaint filed in March of 2000. Succinctly, Liberty argued that the new claims added by the September 29th order "involve policies, databases, and witnesses going back ten additional years: from 1994, when Liberty first started using a medical cost and utilization database to adjust claims under its own policies, to the mid 1980s, when at least two of Liberty's affiliates started using such databases...[and] [n]othing in the original complaint or the amended complaint told Liberty that it would be required to defend such claims."

The petitioners moved to remand the case to state court. They contended that a change in class

certification did not "commence" a new action for purposes of CAFA, as enacted by Congress; that no new defendant was added to this suit; that no new claims were added; that CAFA does not apply in any event since the amended certified class "still pertains to claims arising out of Liberty's use of biased, pre-pricing software;" and that the need to add Liberty affiliates and subsidiaries to the class definitions stems directly from Liberty's established discovery abuses. As the petitioners argued, the change in the scope of the class definition arises directly from Liberty's prior discovery violations and the state court's default order; and Judge Nowicki's order of September 29, 2005, certifying the class did not commence any new claims but rather defined the scope of claimants who could recover on these pre-existing claims, given Liberty's obstinate refusal for over five years to identify "the true defendant" in this case and the dimensions of its and its affiliates' responsibility for using their biased computer database.

On December 13, 2005, the District Court, Castillo, J., granted the petitioners' motion to remand the matter to state court(App. 15-26). He ruled that the change in class certification from all insureds of Liberty Mutual Insurance Company to all insureds of Liberty, its affiliates and subsidiaries relates back to the original complaint and while the amendment invokes different, additional policies than originally alleged, it does not cause such greater amount of legal research and discovery that it commences new litigation(*Id.* at 19-20). Nor does removal to federal court lie even if it creates new legal theories of liability(*Id.* at 20-21). In addition, while the amended class of plaintiffs may cause liability to reach farther back in time than

Liberty envisioned under the original complaint, that fact alone is not enough to create new litigation since the suit still involved the same claim alleged in the original complaint, i.e., the unfair, unauthorized use by Liberty of a biased database to diminish reimbursement of medical expenses for insureds of Liberty, its affiliates and subsidiaries(*Id.* at 22-23).

Finally, the district judge rejected Liberty's claims that the amended class definition implicates ERISA claims thereby justifying removal under either CAFA or the federal preemption doctrine(*Id.* at 23-24). Referring to Judge Nowicki's decision of September 29, 2005, Judge Castillo determined that the claims of the new class would include only insureds of property and casualty policies, *not* those who are insured by group health insurance policies(*Id.* at 24). As he concluded in remanding the case to state court, "[t]his is not an attempt at 'artful pleading' by [petitioners] to avoid a federal claim; rather it is a creative attempt by Liberty to find another way into federal court" (*Id.*).

Without full briefing or oral argument, the court of appeals granted Liberty's petition to appeal and reversed Judge Castillo's ruling. *Kirsten Knudsen, Chris Baker and Vikki Baker v. Liberty Mutual Insurance Company*, 435 F. 3d 755(7th Cir.2006)("*Knudsen II*")(App.1-8). Minimizing Liberty's deliberate, five-year refusal in state court discovery to provide the identity of the true defendant in this case as merely "arguable error" and sanitizing Liberty's conduct (which justified its default in state court) as simply "not doing enough in discovery," the court speaking again through Judge Easterbrook ruled that the amended class certification imports new claims into

this proceeding which commences new litigation for purposes of CAFA(*Id.* at 5-7).

Relying upon Liberty's self-serving characterizations of the state court proceedings and its other post-removal submissions in federal court at odds with its conduct in state court, Judge Easterbrook found as a fact that the amended class definition now includes insureds of some of Liberty's affiliates *whose claims Liberty did not adjust*, e.g., Liberty Northwest Corporation and Employers Insurance of Wausau(*Id.* at 6-7). This was enough for him to conclude that new claims had been commenced within CAFA's coverage period justifying Liberty's removal(*Id.* at 7).

The court of appeals accordingly vacated Judge Castillo's order, revoked the remand and ordered the district court to decide the case on its merits without regard either to the state judge's order of default (or contempt) against Liberty or the scope of the class certification which she had approved(*Id.* at 7-8).

On February 22, 2006, the Court of Appeals denied the petitioner's timely filed petition for rehearing and rehearing *en banc*(App. 27-28).

REASONS FOR GRANTING THE PETITION

1. Amending The Class Entitled To Pursue A Class Action Begun In State Court Before CAFA Was Enacted Due To The Defendant's 5-Year Refusal To Disclose The True Defendant In This Case Does Not "Commence" A New Action Which The Defendant Can Remove To Federal Court Under CAFA And To Rule Otherwise Undermines Congress' Intent In Enacting This Legislation And Overrules This Court's Decisions Recognizing The Right Of Class Members To Redefine Themselves Without The Risk Of "Commencing" New Litigation.

In this class action begun in the Illinois state courts in March of 2000, Liberty made knowing, deliberate and bad faith misrepresentations in its pleadings concerning its standing as the correct defendant; it has stalled the petitioners' legitimate discovery at every turn so that the statute of limitations could run against the nominally "correct" defendant; and it has moved to dismiss for lack of "standing" when it became clear that discovery sanctions against it were imminent. Liberty has refused to comply *with at least six* of the state court's orders requiring it to provide responses to the petitioners' discovery requests over a five-year span. This egregious behavior earned it a default judgment and the striking of its answer and affirmative defenses. *Liberty is still in contempt of the Circuit Court's discovery orders* and it has demonstrated a deliberate, continuing disregard for the state courts' authority in this litigation.

In the face of Liberty's refusal to disclose the actual relationship it has with its affiliates and subsidiaries so that the petitioners could sensibly clarify and refine the dimensions of its class action and the national class members who would pursue it, the Illinois Circuit Court justifiably allowed the class of plaintiffs seeking relief to encompass

> "all insureds of Liberty Mutual Insurance Company, its affiliates and subsidiaries (collectively "Liberty Mutual"), their third party beneficiaries and their assignees who submitted medical bills covered by a Liberty Mutual insurance policy, and whose claims were paid for less than the medical charge, based upon the application of a medical cost and utilization database."

However, contrary to the court of appeals' surmise, this redefined class—caused by Liberty's own refusal to enlighten either the petitioners or the state court about its relationship with its various component companies, Liberty *Fire* among them—*never* included claims which Liberty did not adjust. Instead, it includes only those claims of insureds of Liberty, its affiliates or subsidiaries *which Liberty adjusted* using the offending database.

That such a commonsense clarification of the petitioners' class in this five-year-old state litigation could be characterized as "commencing" a new civil action which gives Liberty the right to remove the matter to federal court under the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4(February 18, 2005) ("CAFA"), and there to continue to litigate this

case unencumbered by the state court contempt and default judgments which it so justly deserved in that forum, is a red flag that Congress' intent in enacting CAFA has been undermined and that this Court's decisions acknowledging the right of class members to redefine themselves without starting new litigation have been effectively overruled.

Moreover, in view of the disarray among the Circuits about CAFA's capacity to allow the removal of state court litigation begun before its enactment, this Court should resolve the confusion and define CAFA's contours so that a recalcitrant and contumacious defendant who has obstructed discovery for five years in state court is not rewarded with a federal forum where it can shed the default judgment entered against it in state court and renew its fraudulent "shell game" concerning its true identity.

CAFA, amending 28 U.S.C. Section 1332(d), confers federal jurisdiction over class actions involving at least 100 members and over $5 million in controversy when minimal diversity, i.e., diversity between *any* defendant and *any* plaintiff class member, is met. 28 U.S.C. Section 1332(d) (2)(A). See *Exxon Mobil Corp. v. Allapattah Services*, ___U.S.___, 125 S. Ct. 2611, 2640 n.12 (2005) (Ginsberg, J., dissenting). Its own removal statute allows any defendant to remove to federal district court a qualifying action without regard to the residence or consent of the other defendants, 28 U.S.C. Section 1453(b); and Section 1453(c)(1) provides for appellate review of motions to remand despite the usual bar of such review in Section 1447(d).

Congress' purpose in enacting CAFA was to ameliorate the abuses encountered by national class action plaintiffs when their rights were decided by state and local courts, undermining the national judicial system, the free flow of commerce and the concept of diversity jurisdiction. Pub. L. 109-2, Section 2(a)(4) & (b), 119 Stat. at 4-5. CAFA was therefore aimed at assuring prompt and fair recoveries for class members with legitimate claims, restoring the Framers' intent that national class actions be decided in a federal forum under diversity jurisdiction; and encouraging innovation and the lowering of consumer prices. *Id.* "While some defendants may benefit by having their cases in federal court instead of state court, this is *not* a stated purpose of the Act." *Plubell v. Merck & Co.*, 434 F.3d 1070, 1073-1074(8th Cir. 2006)(emphasis supplied).

Section 9 of CAFA makes it apply "to any civil ~~action~~ commenced on or after the date of [its] enactment," February 18, 2005, and it is not retroactive. *Exxon Mobil Corp.*, ___ U.S. at ___, 125 S. Ct. at 2627-2628. As the court in *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1095-1096(10th Cir. 2005), noted, CAFA's legislative history makes clear that the Senate's more restrictive view of its retroactive reach was adopted so that "Congress signaled an intent to narrow the removal provisions of the Act to exclude currently pending suits" and wanted the statute to apply only to civil actions actually begun *after* CAFA became effective on February 18, 2005. *Id. Brown v. Kerkhoff*, 2005 WL 2671529(S.D. Iowa 2005).

The question presented in this class action, begun in 2000, is whether the order amending the petitioners' class in the wake of a default judgment

entered against Liberty in 2005, *after* CAFA was enacted, constitutes the "commencement" of a new civil action against Liberty entitling it to remove this action to federal court. In the short time since CAFA's passage, the federal courts have employed *three* different approaches to answering this question. The first group of courts treats the language of CAFA as a "bright line," reasoning that since "a civil action" can only be commenced once, if it was commenced before CAFA was enacted, any amendment occurring in the litigation after CAFA's enactment is irrelevant and cannot invoke CAFA's right of removal. See, e.g., *Gomes v. Microsoft Corp.*, 403 F. Supp. 897, 903(S.D. Iowa 2005); *Weekly v. Guidant Corp.*, 393 F. Supp. 2d 1066, 1067-1068(E.D. Ark.2005); *Hot Springs County Solid Waste Authy. v. UnitedHealth Group*, 2006 U.S. Dist. Lexis 10028(W.D. Ark. 2006).

A second group of decisions acknowledge that with litigation begun before February 18, 2005, there may be amendments after CAFA's enactment which invoke the right to remove the matter to federal court. These courts take the position that in order to determine whether an amendment relates back to a prior pleading or kicks off fresh litigation triggering CAFA's right to remove, resort must be had to the forum state's own law governing the relation back of amendments to pleadings; and the governing state law's relation-back analysis, much along the lines of Fed. R. Civ. P. 15(c), controls the "commencement" inquiry for *all* amendments with no distinction being made for those which add defendants. See, e.g., *Prime Care of Northeast Kansas LLC v. Humana Insurance Company*, ___F.3d___, ___(10th Cir. 5/12/06); *Plubell v. Merck & Co.*, 434 F.3d at1073-1074(8th Cir.2006);

Eufaula Drugs, Inc. v. ScripSolutions, 2005 WL 2465746 at 2-4(M.D. Ala. 2005); *New Century Health Quality Alliance, Inc. v. Blue Cross & Blue Shield of Kan. City, Inc.*, 2005 WL 2219827 at 3-5(W.D. Mo. 2005).

A third group of courts employ the relation-back analysis for all amendments except those which add defendants—those amendments are categorically treated as commencing a new case as to the added defendant(s) entitling them to removal under CAFA. See, e.g., *Braud v. Transp. Serv. Co.*, 2006 WL 880051 at 1-4(5th Cir. 4/6/06); *Schillinger v. Union Pac. R.R.*, 425 F. 3d 330, 333(7th Cir. 2005); *Knudsen I*; *Adams v. Fed. Materials Co.*, 2005 WL 1862378 at 3-4(W.D. Ky. 2005).

These disparate, irreconcilable decisions by courts in the 6th, 7th, 8th, 10th and 11th Circuits about the right to remove under CAFA in the wake of amendments in ongoing state court class actions demonstrate the need for this Court to clarify the dimensions of the removal right so that Congress' intent in enacting this legislation will be realized. The confusion among the lower federal courts on this issue has frustrated congressional intent, failed to provide any durable standards for measuring the right to remove national class actions filed in state court before CAFA, and led to the spawning of strategic removal actions by well financed state court defendants seeking to frustrate, delay and impede the resolution of state court class litigation.

The court of appeals here, for example, found as a fact that the amended class definition now includes

insureds of some of Liberty's affiliates whose claims Liberty did not adjust, e.g., Liberty Northwest Corporation and Employers Insurance of Wausau, and this was enough for it to conclude that new claims had been commenced justifying Liberty's removal(*Id.* at 6-7). This finding, in turn, relied upon Liberty's own post-removal, self-serving view of the state court action, proceedings *which it had deliberately sabotaged* in order to claim prejudice before the federal courts. Instead of sending this case back to the state court for a determination of any imperfections in the amended class' definition, Judge Easterbrook peremptorily extinguished five years of state court litigation—together with the default judgment Liberty rightly deserved----and ordered the district court to decide the case on its merits without regard either to the state judge's order of default (and contempt) against Liberty or the scope of the class certification which she had approved.

Lost in this assumption of federal power over a state class action begun five years before CAFA was enacted is the simple truth that, contrary to the court of appeals' surmise, this class redefinition—caused by Liberty's own refusal throughout discovery to enlighten either the petitioners or the state court about its relationship with its various companies, Liberty *Fire* among them—*never* included claims which Liberty did not adjust. Instead, it includes only those claims of the insureds of Liberty, its affiliates or subsidiaries *which Liberty adjusted* using the offending database. If the court of appeals had any doubts on this score, it could have sent the case back to the Circuit Court and requested that Judge Nowicki issue a ruling on whether the amended class included those claims made

by insureds of Liberty, its affiliates and subsidiaries which Liberty did *not* adjust. Instead of doing so, it burdened the district judge with this five-year-old litigation which does not belong in federal court. Nothing in CAFA or in relation-back principles justifies this result.

In order to promote Congress' intent in enacting CAFA, to discourage class action defendants from "creating" new claims out of every amendment in order to forum shop, and to avoid lost time and attendant attorney's fees, this Court should adopt a "bright line" rule, i.e., that a claim is "commenced" for purposes of CAFA only with the filing of the original complaint. As the district judge in *Plummer v. Farmers Group, Inc.*, 388 F. Supp. 2d 1310,1317(E.D. Okla. 2005), recognized,

> [s]uch a test, with no exceptions, would not only be logical (i.e., a claim commences when it commences) but also predictable. Multi-factor, sliding scale, balancing tests do more than leave lawyers and litigants mired in unpredictability; *they also put too much power in the hands of federal judges*. While the [relation-back] test is consistent with the precedent on this issue..., it produces a much closer question than a bright line test.

Id.(emphasis supplied). Whether an action has been commenced here is governed by Illinois law. *Burham v. Humphrey Hospitality Reit Trust., Inc.*, 403 F.3d 709, 712(10th Cir. 2005). *Cf. Walker v. Armco Steel Corp.*, 446 U.S. 740, 751(1980)(state law determines when an action commences for limitations purposes).In Illinois, the filing of the petitioners' complaint against

Liberty in 2000 in Circuit Court commenced this suit, 735 ILCS 5/2-201(a); *Jackson v. Navik*, 308 N.E. 2d 143,145(Ill. App. 1974); *Kohlhaas v. Morse*, 183 N.E.2d 16, 19(Ill. App. 1962), and under a "bright line" test, Liberty was not entitled to remove under CAFA.

Even under Illinois' relation-back principles, see 735 ILCS 5/2-616(b); *Chandler v. Illinois Central R.R.*, 798 N.E. 2d 724, 732-733(2003), the "fresh" claim allegedly asserted by the petitioners' against Liberty with their amended class of plaintiffs in 2005 was nothing new. Its core claim of Liberty's deceptive and unfair use of a biased database remained the same as their original complaint and that seminal filing furnished Liberty with all the information it need to prepare a defense to this later amended class; nothing had changed. *McCorry v. Gooneratne*, 775 N.E.2d 591, 599(Ill. App. 1 Dist. 2002). *Marek v. OB Gyne Specialists II, S.C.*, 746 N.E.2d 1,8(Ill. App. 1 Dist. 2001). *Steinberg v. Dunseth*, 658 N.E.2d 1239, 1246(Ill. App. 4 Dist. 1995). *Accord, Phillips v. Ford Motor Co.*, 435 F.3d 785, 787-788(7th Cir. 2006).

In any event, these events are routine matters in class action suits and provide no occasion, especially after Liberty's default for its repeated failure to illuminate the nature of its holdings, to suppose that a new claim had been made against it. 735 ILCS 5/2-802(a). *Steinberg v. Chicago Medical Sch.*, 371 N.E.2d 634, 645(1977). *Regnery v. Meyers*, 679 N.E. 2d 74, 81(Ill. App. 1 Dist. 1997). Besides, Illinois law entitled the petitioners to correct by amendment the misnomer of the petitioners' class, a misnomer caused by Liberty's refusal to identify for five years its affiliates and subsidiaries, without the amendment kicking off a

new action for purposes of CAFA. 735 ILCS 5/2-616(b). *Norman A. Koglin Assoc. v. Valenz Oro*, 680 N.E. 2d 283, 290(1997). *Accord, Plubell v. Merck & Co.*, 434 F.3d at 1073; *New Century Health Quality Alliance, Inc. v. Blue Cross & Blue Shield of Kan. City, Inc.*, 2005 WL 2219827 at 4-5; *Heaphy v. State Farm Mutual Automobile Insurance Co.*, 2005 WL 1950244 at 4(W.D. Wash. 2005). Contrast *Schiavone v. Fortune*, 477 U.S. 21, 28(1986)("This was not a situation where the ascertainment of the defendant's identity was difficult for the plaintiffs").

Finally, the petitioners' suggested resolution is most consistent with this Court's recognition in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 551(1974), that the commencement of their class action in 2000 "satisfied the purpose of the limitation provision as to all those *who might subsequently participate* in the suit as well as for the named plaintiffs." *Id.* at 551-554 (emphasis supplied). Otherwise, the members of the class of plaintiffs added by the 2005 amendment—none of whom has slept on his rights—would have been forced to intervene earlier in order to preserve their claims and one of the major goals of class litigation, i.e., to simplify litigation involving a large number of class members with similar claims, would have been defeated. *Devlin v. Scardeletti*, 536 U.S. 1, 10(2002). Thus the order amending the class of plaintiffs in 2005 did not commence a new action or "fresh litigation" for purposes of CAFA and Liberty was not entitled to remove the action to federal court because of it.

2. Public Policy, Concerns For Comity And A Pragmatic Federalism Are Not Served By Usurping A State Court's Power To Enforce Its Own Judgments And Rewarding A Recalcitrant And Contumacious State Court Defendant With A Federal Forum Under CAFA Where It Can Evade The Default Judgment In State Court And Renew Its Frivolous Defense To The Petitioners' Class Action.

Liberty's interpretation of CAFA would empower federal courts to pluck cases from state court on the eve of trial or, as in this case, on the cusp of an assessment of damages after a default judgment had entered against it. Yet this view of an all-powerful federal judiciary is intolerable; it is disruptive of federal-state comity as well as the settled expectations of the litigants. Permitting removal in this case "would effectively apply new rules to a game in the final minutes of the last quarter," in effect using a jurisdictional statute like CAFA, intended to curtail "jurisdictional gaming" and forum shopping, to accomplish this very result. See *Pritchett v. Office Depot, Inc.*, 404 F.3d 1232, 1238 (10th Cir. 2005). The disposition below also raises basic due process concerns, see *Hansberry v. Lee*, 311 U.S. 32, 40(1940), and invokes this Court's duty of superintendence over the federal judiciary to insure that our system of federalism accommodates the integrity of state court class actions and the judgments they ultimately render against recalcitrant and contumacious defendants.

CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Seventh Circuit and, ultimately, to vacate that judgment and remand the matter to the state courts of Illinois for renewed discovery on the issue of the damages and costs due the petitioners from Liberty on the merits of their claims; or to provide the petitioners with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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No. 05-8037

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KIRSTEN KNUDSEN, CHRIS BAKER, and VIKKI BAKER,
Plaintiffs-Respondents,

v.

LIBERTY MUTUAL INSURANCE COMPANY,
Defendant-Petitioner.

January 5, 2006, Submitted
January 27, 2006, Decided

COUNSEL: For LIBERTY MUTUAL INSURANCE COMPANY, Petitioner: Stephen M. Shapiro, MAYER, BROWN, ROWE & MAW, Chicago, IL, USA.

For KIRSTEN KNUDSEN, Respondent: Robert A. Holstein, HOLSTEIN LAW OFFICES, Chicago, IL, USA.

For CHRIS BAKER, VIKKI BAKER, Respondents: Paul M. Weiss, FREED & WEISS, Chicago, IL, USA.

JUDGES: Before COFFEY, EASTERBROOK, and MANION, Circuit Judges.

OPINION BY: EASTERBROOK

OPINION: EASTERBROOK, *Circuit Judge.* Liberty Mutual Insurance Company has removed this litigation to federal court a second time, again invoking the Class Action Fairness Act of 2005, 119 Stat. 4 (2005). Last year we held that the initial removal was unavailing, because the suit had been "commenced" in state court before February 18, 2005, the new Act's effective date. 411 F.3d 805 (7th Cir. 2005). Liberty Mutual contended that the only appropriate defendant is Liberty Mutual Fire Insurance Company, which had issued the policies on which plaintiffs sought to collect. It argued that a mention of Liberty Fire in a proposed amendment to the class definition effectively began a new suit. We thought otherwise, observing that Liberty Mutual remained the only defendant and that the state judge had not acted on the plaintiffs' proposal by adding either new claims or new parties. But we added: "Maybe that lies in store. . . . If in the future Liberty Mutual Fire Insurance Company should be added as a defendant, it could enjoy a right to remove under the 2005 Act, for suit *against it* would have been commenced after February 18, 2005." *Id.* at 807-08 (emphasis in original). Liberty Mutual contends that this has come to pass.

Plaintiffs allege that Liberty Mutual pays unjustifiably little on claims for medical services under workers' compensation and casualty (accident) policies. All three plaintiffs are covered by or have claims derived from policies issued by Liberty Mutual Fire Insurance Company. The suit they commenced in Illinois, however, named as a defendant only its corporate parent, Liberty Mutual Insurance Company.

The complaint did not allege that Liberty Mutual and Liberty Fire are so lax about corporate formalities that their separate existence may be disregarded under veil-piercing principles (those of Massachusetts, where they are incorporated), or that Liberty Fire deceived its insureds into thinking that the policies were backed by a firm with deeper pockets. See *United States v. Bestfoods*, 524 U.S. 51, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998) (discussing principles of state law that determine parent corporations' liability for acts of subsidiaries and affiliates). Instead the plaintiffs have argued--and the state judge has held--that Liberty Mutual is liable because it did not do enough in discovery to alert plaintiffs' counsel to the need to substitute Liberty Fire as a defendant. Indeed, the state court thought that Liberty Mutual's "concealment" of Liberty Fire's role (despite the fact that only Liberty Fire's name is on the policies) is so egregious that it has entered a default in plaintiffs' favor on the merits, leaving only damages for consideration.

After our first decision plaintiffs sought more relief-*much* more relief. They asked the state court to hold Liberty Mutual responsible for *all* policies issued by *any* subsidiary or affiliate, about 35 firms in all. Plaintiffs asked, moreover, that all claims for payment by all insureds on all of these policies everywhere in the nation be covered by the default, so that Liberty Mutual would be compelled to pay without proof that an affiliate had failed to honor any policy. It should be enough, plaintiffs contended, that an insurer disbursed less than the medical bill, regardless of any policy's actual terms. This would override co-payment requirements, caps on total indemnity, schedules of allowable fees, and many other common clauses.

Finally, plaintiffs proposed that they be certified to represent a nationwide class, and that the court disregard any difference in insurance and workers' compensation laws across the 50 states. Despite decisions by both the Supreme Court of Illinois and this court describing the grave problems with class actions for damages under multiple states' laws, see *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 835 N.E.2d 801, 296 Ill. Dec. 448 (2005); *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation*, 288 F.3d 1012 (7th Cir. 2002), the state judge approved plaintiffs' proposal with immaterial changes. The class as certified is: "All insureds of Liberty Mutual Insurance Company, its affiliates and subsidiaries (collectively 'Liberty Mutual'), their third party beneficiaries and their assignees who submitted medical bills covered by a Liberty Mutual insurance policy, and whose claims were paid for less than the medical charge, based upon the application of a medical cost and utilization database."

The order certifying this class was entered on September 29, 2005, well after the Class Action Fairness Act's effective date, and Liberty Mutual immediately filed a notice of removal. A second removal is proper when based on a new development. See 28 U.S.C. § 1446(b) AP2: "If the case stated by the initial pleading is not removable, a notice of removal maybe filed within thirty days after receipt by the defendant . . . of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable". But the district court remanded the proceeding. It held that, because Liberty Mutual remains the one and only defendant, the "commencement" date is still the time of

the suit's filing in state court, just as we held on the prior appeal. 405 F. Supp. 2d 916, 2005 U.S. Dist. LEXIS 33102 (N.D. Ill. Dec. 13, 2005). The district judge relied not only on *Knudsen I* but also on two later decisions holding that routine changes in class definitions--the sort that relate back to the original pleading for limitations purposes--do not "commence" new actions. See *Schorsch v. Hewlett-Packard Co.*, 417 F.3d 748 (7th Cir. 2005); *Schillinger v. Union Pacific R.R.*, 425 F.3d 330 (7th Cir. 2005).

Liberty Mutual is the original defendant, but it is faced with new claims for relief. Illinois law, which we described in *Schorsch* and *Schillinger*, provides that a new contention relates back to the original complaint (and hence is not a new "claim for relief " or "cause of action") when the original pleading furnishes the defendant with notice of the events that underlie the new contention. See also 735 ILCS § 5/2-616(b); *Zeh v. Wheeler*, 111 Ill. 2d 266, 282, 489 N.E.2d 1342, 1349, 95 Ill. Dec. 478 (1986). *Schorsch* holds that a complaint dealing with instructions in computer chips alleged a single claim, whether the chips were embedded in drum kits for laser printers (as the original complaint alleged) or toner cartridges that work with these drum kits (as the amended pleading added). *Schillinger* holds that a complaint dealing with railroads' use of rights of way stated a single claim no matter how many states the track passed through. Similarly, a complaint alleging that Liberty Mutual mishandled its "medical cost and utilization database" when adjusting demands for payment of medical bills would be one claim, whether Liberty Mutual or Liberty Fire had issued the policy: the grievance concerns the way that a particular "medical cost and utilization database" works, and the

number of different policies or issuers to which a single database and software package applies would be a detail, as long as Liberty Mutual itself did the adjustment work using the contested procedure.

What causes the class definition of September 2005 to initiate new claims is the fact that Liberty Mutual does not adjust all demands for payment of all of its affiliates' policies. For example, Liberty Northwest Corporation, one of Liberty Mutual's affiliates, has adjusted claims against its own policies since 1996 using its own cost-and-utilization software. The complaint initially filed in this case could not have notified Liberty Mutual that plaintiffs contested any decision made by Liberty Northwest--nor did the complaint allege that Liberty Mutual and Liberty Northwest are alter egos. It did not mention any insurer other than Liberty Mutual itself. Our first opinion, issued in June 2005, noted that plaintiffs had not made an alter-ego or veil-piercing argument. Apparently they have changed their tune, but contentions first raised in the second half of 2005 cannot demonstrate that Liberty Mutual was on notice of this claim for relief before February 18, 2005.

Employers Insurance of Wausau provides an even better example. Liberty Mutual acquired Wausau in 1998, so it is part of "Liberty Mutual" under the class definition. Wausau has employed a "medical cost and utilization database" since 1985. It adjusts its own claims, however--obviously so before the acquisition. Yet the class includes all insureds (and their assignees) whose claims were adjusted by Wausau using its own data and methods back to 1985, when Wausau's cost-and-utilization database was inaugurated. Because of the default, moreover, Liberty Mutual cannot invoke

the statute of limitations or present any other defense; to be included in the class definition is to be assured of victory. The complaint that Knudsen filed in March 2000 did not even hint that Liberty Mutual might be accountable for underpayments on the Wausau policies, claims against which had been adjusted as long as 15 years earlier under a distinct system. Any effort to recover on account of these policies is a distinct claim for relief ("cause of action" in the state's parlance). And as we intimated in *Knudsen I* and *Schorsch*, and now hold, a novel claim tacked on to an existing case commences new litigation for purposes of the Class Action Fairness Act.

The conduct of plaintiffs and the state judge in this litigation, turning an arguable error in discovery into a sprawling proceeding in which Liberty Mutual will be required to pay on account of other insurers' decisions taken long ago under different rules for calculating proper payment, and without any opportunity to defend itself on the merits or even insist that the policies' actual terms be honored, illustrates why Congress enacted the Class Action Fairness Act. The stakes exceed $ 5 million; more than two-thirds of the class members live outside Illinois; minimal diversity is established. See 28 U.S.C. § 1332(d), § 1453(b) (as amended by the 2005 Act). The addition of new claims after February 18 means that litigation has been commenced within the Act's coverage period.

We grant the petition for leave to appeal. The decision of the district court is vacated, and that court must revoke the remand and decide this litigation on the merits. The Class Action Fairness Act provides for federal resolution of the plaintiffs' claims, so the district

court need not (and should not) give any weight to the state judge's order of default and the scope of the class certification. These and all other questions are open to independent resolution in the federal forum.

No. 05-8010

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KIRSTEN KNUDSEN, CHRIS BAKER, and VIKKI BAKER,
Plaintiffs-Respondents,

v.

LIBERTY MUTUAL INSURANCE COMPANY,
Defendant-Petitioner.

April 29, 2005, Submitted
June 7, 2005, Decided

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For CHRIS BAKER, and VIKKI BAKER, Respondents: William J. Harte, HARTE & ASSOCIATES, Chicago, IL USA; Robert A. Holstein, HOLSTEIN LAW OFFICES, Chicago, IL USA.

JUDGES: Before COFFEY, EASTERBROOK, and WILLIAMS, Circuit Judges.

OPINION BY: EASTERBROOK

OPINION: EASTERBROOK, *Circuit Judge.* The Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005), permits defendants to remove certain class actions to federal court if minimal diversity of citizenship exists. Section 9 tells us that it applies only to suits "commenced on or after the date of enactment of this Act." That date is February 18, 2005. Invoking the removal authority under § 5, codified at 28 U.S.C. § 1453, Liberty Mutual Insurance Company removed this class action, which had been pending in state court since March 2000. The district judge promptly sent it back, observing that March 2000 precedes February 2005. Now Liberty Mutual asks us to entertain an appeal, a step that § 1453(c)(1) allows notwithstanding the norm in 28 U.S.C. § 1447(d) that remand orders are not reviewable.

We deny this petition, for we agree with *Pritchett v. Office Depot, Inc.*, 404 F.3d 1232, 2005 U.S. App. LEXIS 5896 (10th Cir. Apr. 11, 2005), that § 9 of the new Act must be taken seriously. Deconstructionist tactics do not permit its evasion. The defendant in *Pritchett* contended that the notice of removal itself commenced a new case (the one in federal court). Rebuffing that effort to sidestep the legislative decision, *Pritchett* concluded that a civil action is "commenced" for purposes of § 9 when it is *filed* in state court and not when some later step occurs in its prosecution. Equating filing with commencement is the norm in civil practice. See Fed. R. Civ. P. 3. Although there are a few exceptions--for example, a litigant who seeks to proceed *in forma pauperis* may be unable to get the suit under way until the judge accepts the complaint and authorizes service on the defendants, see *Williams-Guice v. Chicago Board of Education*, 45 F.3d

161 (7th Cir. 1995)--none applies here. This suit against Liberty Mutual has been ongoing for years.

Instead of arguing that removal equals "commencement," Liberty Mutual contends that any substantial change to the class definition "commences" a new case. Now as a matter of normal language (and normal legal practice) a new development in a pending suit no more commences a new suit than does its removal. Plaintiffs routinely amend their complaints, and proposed class definitions, without any suggestion that they have restarted the suit--for a restart (like a genuinely new claim) would enable the defendant to assert the statute of limitations. Liberty Mutual concedes that routine changes do not allow removal but insists that a "substantial" or "significant" change must do so. Yet significance is not the measure of a new claim; a plaintiff may assert an entirely novel legal theory in mid-suit without creating a "new" claim in the sense that the defendant could block it by asserting that it had been propounded after the period of limitations expired. Moreover, "significance" often lies in the eye of the beholder; it is not a rule of law so much as it is a cast of mind or an assessment of likely consequences, which may be difficult if not impossible to foresee. A doctrine of "significant change" thus would go against the principle that the first virtue of any jurisdictional rule is clarity and ease of implementation. See, e.g., *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03, 100 L. Ed. 2d 178, 108 S. Ct. 1717 (1988); *Hoagland v. Sandberg, Phoenix & Von Gontard, P.C.*, 385 F.3d 737, 740 (7th Cir. 2004) (collecting authority).

Liberty Mutual paints a picture of crafty lawyers tending a garden of pre-2005 class actions, in which

they plant new claims by amendment so that the 2005 Act never comes into play. As we have already hinted, however, a new claim for relief (a new "cause of action" in state practice), the addition of a new defendant, or any other step sufficiently distinct that courts would treat it as independent for limitations purposes, could well commence a new piece of litigation for federal purposes even if it bears an old docket number for state purposes. Removal practice recognizes this point: an amendment to the pleadings that adds a claim under federal law (where only state claims had been framed before), or adds a new defendant, opens a new window of removal. 28 U.S.C. § 1446(b). See Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, 14C *Federal Practice & Procedure* § 3732 at 311-48 (3d ed. 1998). We imagine, though we need not hold, that a similar approach will apply under the 2005 Act, perhaps modeled on Fed. R. Civ. P. 15(c), which specifies when a claim relates back to the original complaint (and hence is treated as part of the original suit) and when it is sufficiently independent of the original contentions that it must be treated as fresh litigation. See also *Schiavone v. Fortune*, 477 U.S. 21, 91 L. Ed. 2d 18, 106 S. Ct. 2379 (1986); *Arendt v. Vetta Sports, Inc.*, 99 F.3d 231 (7th Cir. 1996). This possibility does Liberty Mutual no good, however, because the change in class definition does not present a novel claim for relief or add a new party.

Maybe that lies in store. The suit charges Liberty Mutual with failing to live up to promises made in its policies. Plaintiffs proposed this class:

All LIBERTY insureds, their third party beneficiaries and their assignees who are entitled to payment of

medical bills under any medical payments coverages pursuant to a LIBERTY insurance policy, and who have received a payment from LIBERTY for less than the medical charge, based upon the application of LIBERTY's medical cost and utilization database.The complaint defined "LIBERTY" as Liberty Mutual Insurance Company--which is only natural, as it is the sole defendant. Liberty Mutual responded that plaintiffs could not represent this class, for they don't belong to it. All three plaintiffs' claims derive from policies issued by Liberty Mutual Fire Insurance Company, an insurer with its own policies and reserves. So on February 25, 2005, plaintiffs proposed to amend the class definition in a way that would make them members, and hence eligible to be representatives:All Liberty Mutual Insurance Company and Liberty Fire Insurance Company insureds, their third party beneficiaries and their assignees who submitted medical bills under any medical payments coverages pursuant to a Liberty Mutual or Liberty Fire insurance policy, and whose claims were paid for less than the medical charge, based upon the application of a medical cost and utilization database.

This is an odd revision--and not simply because "Liberty Fire Insurance Company" does not exist. The fatal problem is that Liberty Mutual Fire Insurance Company is not a party to the suit, so no relief could be entered against it. (Plaintiffs do not contend that Liberty Mutual Fire Insurance Company and Liberty Mutual Insurance Company are alter egos. If these were just two names for one business, then no change in the class definition would have been necessary.) Before the state judge could address the plaintiffs' latest proposal, however, Liberty Mutual Insurance

removed the case. That's unavailing, for reasons we have covered. If in the future Liberty Mutual Fire Insurance Company should be added as a defendant, it could enjoy a right to remove under the 2005 Act, for suit *against it* would have been commenced after February 18, 2005. But Liberty Mutual Insurance Company cannot remove five years after this suit was commenced just because a non-party corporate sibling has been mentioned in plaintiffs' latest papers.

The petition for leave to appeal is denied. This makes it unnecessary to act on Knudsen's motion to strike the petition for leave to appeal–though we hope that in the future potential appellees will address the issues directly rather than move to strike the appellants' papers. The motion to strike supposes that the Class Action Fairness Act does not apply (and, since it does not, that 28 U.S.C. § 1447(d) forecloses appellate review). Yet whether the 2005 Act *does* apply is the very issue to be determined, and "a federal court always has jurisdiction to determine its own jurisdiction." *United States v. Ruiz*, 536 U.S 622, 628, 153 L. Ed. 2d 586, 122 S. Ct. 2450 (2002). A motion to strike begs the principal question.

No. 05 C 5924

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

DR. KIRSTEN KNUDSEN, D.C.,
Plaintiff,

and

CHRIS BAKER and VIKKI BAKER,
Plaintiffs-Intervenors

v.

LIBERTY MUTUAL INSURANCE COMPANY,
Defendant.

December 13, 2005, Decided
December 13, 2005, Filed

NOTICE: THIS OPINION WAS VACATED BY THE COURT

COUNSEL: For Kirsten Knudsen, individually and on befalf of all others persons and entities similarly situated, Plaintiff: Robert A. Holstein, Holstein Law Offices LLC, Chicago, IL.

For Liberty Mutual Insurance Company, Defendant: Russell Yager, Vinson & Elkins, Dallas, TX; Steven Brian Belgrade, George Mario Velcich, Belgrade & O'Donnell PC, Chicago, IL; Howard J. Roin, Joel David Bertocchi, John Roggen Schmidt, Stephen J Kane, Mayer, Brown, Rowe & Maw LLP, Chicago, IL; John

Andrew O'Donnell, Belgrade & O'Donnell PC, Chicago, IL;

For Chris Baker, Vikki Baker, Intervenor Plaintiffs: Paul M. Weiss, Jonathan B. Piper, William Michelangelo Sweetnam, Freed & Weiss LLC, Chicago, IL.

JUDGES: Judge Ruben Castillo, United States District Court Judge.

OPINIONBY: Judge Ruben Castillo

OPINION:

MEMORANDUM OPINION AND ORDER

Judge Ruben Castillor

Dr. Kirsten Knudsen and Chris and Vikki Baker ("Plaintiffs") sued Liberty Mutual Insurance Company ("Liberty") in March 2000 on behalf of themselves and a class of similarly situated persons, alleging that Liberty improperly used medical cost and utilization databases to reduce amounts paid for claims to reimburse its customers for medical expenses incurred under its insurance policies. On September 29, 2005, Cook County Circuit Court Judge Julia Nowicki certified Plaintiffs' amended class definition, and Liberty filed its second notice of removal to federal court. At issue is Plaintiffs' motion to remand the case to state court.

I. Background

On March 30, 2005, Liberty filed its first notice of removal from the Circuit Court of Cook County on the grounds that the Class Action Fairness Act of 2005,

Pub. L. 109-2, 119 Stat. 4 (2005) ("CAFA"), permitted removal of the class action to federal court. On April 19, 2005, this Court ruled that the case was improperly removed to federal court and remanded the case to state court. *See* Order of April 19,2005. Liberty petitioned for leave to appeal the remand. The Seventh Circuit denied Liberty's petition. *Knudsen v. Liberty Mut. Ins. Co., 411 F.3d 805, 806 (7th Cir. 2005).*

Liberty filed another notice of removal to federal court on October 14, 2005 (R. 1), after the state court entered an order on September 29, 2005, certifying the following plaintiff class:

> All insureds of Liberty Insurance Company, its affiliates and subsidiaries (collectively "Liberty"), their third party beneficiaries and their assignees who (1) submitted medical bills covered by a Liberty insurance policy, (2) whose claims were adjusted by Liberty, and (3) whose claims were paid in an amount less than the medical charge, based upon the application of a medical cost and utilization database.

(R. 22, Motion to Remand, Ex. A, Sept. 29 Order at 2.) On October 18, Liberty filed a Corrected Notice of Removal (R. 12), in which Liberty contends that removal is now proper under the Class Action Fairness Act because: (1) the September 29 order adds new claims that do not relate back to the filing of the original complaint in March 2000; and (2) some of the new claims are completely preempted under the Employee Retirement Income Security Act ("ERISA"). Plaintiffs filed the instant motion to remand.[1]

II. Class Action Fairness Act

The Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005), permits defendants to remove certain class actions to federal court if minimal diversity of citizenship exists. CAFA applies only to suits commenced on or after the date of its enactment, February 18, 2005. *Knudsen, 411 F.3d at 806.* In Liberty's first attempt at removal, Liberty argued that Plaintiffs' proposed change of the class definition from "all Liberty insureds" to "All Liberty Insurance Company and Liberty Fire Insurance Company insureds," commenced a new action under CAFA. *Id. at 806-07.* In denying Liberty's petition for leave to appeal, the Seventh Circuit held that a new action was not commenced by the proposed change in class definition. *Id.* While the Seventh Circuit left open the possibility that "a new claim for relief (a new ' cause of action' in state practice), the addition of a new defendant, or any other step sufficiently distinct that courts would treat it as independent for limitations purposes, could well commence a new piece of litigation for federal purposes," the Seventh Circuit held that "this possibility does Liberty no good, however, because the change in class definition does not present a novel claim for relief or add a new party." *Id. at 807.*

Since *Knudsen*, the Seventh Circuit has considered three other cases where the defendant argued that a change in class definition was sufficiently distinct so as to constitute the commencement of a new action.[2] The Seventh Circuit denied the petition for leave to appeal the district court's remand order in each case and emphasized the unlikelihood that the amendment to a class definition could ever constitute the commencement of a new action under CAFA. In

Schorsch v. Hewlett-Packard, although the Seventh Circuit stated that it "can imagine amendments [to the class definition] that kick off wholly distinct claims," the Court of Appeals reiterated that "creative lawyering will not be allowed to smudge the line drawn by the 2005 Act. . . . Amendments to class definitions do not commence new suits." *417 F.3d 748, 751 (7th Cir. 2005).* Likewise, in *Schillinger v. Union Pacific R. Co.,* the Seventh Circuit repeated that "the expansion of a proposed class does not change the parties to the litigation nor does it add new claims." *425 F.3d 330, 334 (7th Cir. 2005)* (emphasis added).

Nevertheless, Liberty claims that the instant case is the "possibility" that the Seventh Circuit "can imagine." In other words, Liberty argues that the state court certification of Plaintiffs' amended class definition from all insureds of Liberty Insurance Company to all insureds of Liberty, its affiliates and subsidiaries, commenced a new action. The test for whether an expanded class definition commences a new action for CAFA removal purposes is whether the new claim "relates back" to the original claim. A claim relates back when it arises out of the same transaction or occurrence as the claim in the original complaint.[3] *Schorsch, 417 F.3d at 751.* An amendment relates back in Illinois "when the original complaint furnished to the defendant all the information necessary . . . to prepare a defense to the claim subsequently asserted . . ." *Id.* (citations omitted).

Liberty alleges that the new class definition contains wholly distinct claims because it: (1) involves additional policies; (2) creates different theories of liability; (3) reaches back farther in time; and (4) arises under federal law. Each of Liberty's arguments fail.

First, while the expanded class definition does involve additional and different policies, "the potential for a larger amount of legal research and discovery in and of itself is not a significant enough step to create new litigation." *Schillinger, 425 F.3d at 334.* In *Schillinger,* the plaintiffs wanted to expand the class from Illinois land owners who allegedly had been harmed by Union Pacific Railroad Company's ("UPRR") use of rights-of-way on their land to property owners nationwide who owned land over which UPRR had a right-of-way. *Id. at 333.* Despite the creation of a nationwide class of plaintiffs, the Seventh Circuit held that this change did not create new litigation. *Id. at 334.* In the instant case, the expansion in research and discovery for Liberty under the new class definition is narrower than in *Schillinger* and involves entities related to Liberty. Thus, the new class definition does not commence a new action by expanding the sheer number of policies at issue.

Second, Liberty argues that the addition of its "affiliates and subsidiaries" created new legal theories of liability based on the claim that Liberty is an "alter-ego" of the affiliates and subsidiaries. However, Illinois state courts and the Seventh Circuit agree that new legal theories, in particular those adding vicarious liability theories of liability, do not create new claims. *See Knudsen, 411 F.3d at 806* ("a plaintiff may assert an entirely novel legal theory in midsuit without creating a new' claim in the sense that the defendant could block it by asserting that it had been propounded after the period of limitations expired"); *Marek v. O.B. Gyne Specialists II, S.C., 319 Ill. App. 3d 690, 699, 746 N.E.2d 1, 9, 253 Ill. Dec. 759 (1st Dist. 2001)* (claim related back because party could not claim surprise or prejudice

where amended pleading contained allegations identical to those made against party's agent, employee and shareholder in original complaint); *Steinberg v. Dunseth, 276 Ill. App. 3d 1038, 1046, 658 N.E.2d 1239, 1246, 213 Ill. Dec. 218 (4th Dist. 1995)* (finding that the addition of vicarious liability counts that were similar to direct liability counts in the original complaint related back, and "the fact that there is a change in [legal] theory is not significant" by itself). Liberty's reliance on *Kennedy v. King, 252 Ill. App. 3d 52, 56, 623 N.E.2d 955, 958, 191 Ill. Dec. 365 (4th Dist. 1993)*, is misplaced. While Liberty alleges a new claim commenced a new action in the instant case, in *Kennedy*, the state court held that a subsequent action for agency or negligent entrustment did not relate back to an original action for negligence against the automobile owner. *Id.* Thus, new legal theories, if any, do not provide a basis for removal to federal court.

Third, Liberty argues that the class certification order created new claims because the order reaches farther back in time. Although the original class definition did not specify a time frame, Liberty did not begin using medical cost and utilization databases to adjust claims for medical benefits under the policies Liberty wrote until 1994. The amendment to the class definition, however, allegedly added two Liberty affiliates or subsidiaries -- Liberty Life and Employers of Wausau -- that began using medical cost and utilization databases to adjust claims for reimbursement of medical bills under group-health policies in the mid-1980's.

The alleged change in time-frame, like the increase in the number of policies at issue, does nothing more than increase "the potential for a larger amount of legal

research and discovery." *Schillinger, 425 F.3d at 334.* In *Schillinger*, the Seventh Circuit reasoned that expanding the plaintiff class from state-wide to nation-wide did not commence a new action because the suit still involved "the same claim alleged in the original complaint" and plaintiffs similarly situated to the Schillingers. *Id.* That same reasoning applies in this case. The class certification order does not change Plaintiffs' original claim: that "claims were paid in an amount less than the medical charge, based upon the application of a medical cost and utilization database." In addition, the plaintiffs, regardless of how far back in time their medical claims reach, all share this ultimate claim.

The Illinois cases to which Liberty cites do not change this analysis. In *Flynn v. Szwed*, the plaintiff's original complaint contained specific allegations of medical negligence occurring in 1980, and the plaintiff attempted to add other, distinct claims of negligence that occurred in 1978 and 1979. *224 Ill. App. 3d 107, 115, 586 N.E.2d 539, 544, 166 Ill. Dec. 581 (1st Dist. 1991).* The state court held that these discrete acts did not constitute a continuous, regular course of treatment, and thus did not relate back. Similarly, in *Strickland v. Commc'ns & Cable of Chi., Inc.*, the plaintiff attempted to amend the original complaint to include a distinct claim of negligence. The plaintiff, who had been assaulted by an employee of the defendant, originally alleged that the defendant was negligent for not adequately investigating its employee's background before hiring him. *304 Ill. App. 3d 679, 687, 710 N.E.2d 55, 61, 237 Ill. Dec. 632 (1st Dist. 1999).* The state court held that the plaintiff could not amend her complaint to add claims that the defendant approved and ratified the

assault, because this was a separate claim of negligence that occurred after the assault. *Id. at 685.*[4] In contrast, in the instant case, as in *Schillinger*, the expanded class involves the same allegations of use of the medical cost and utilization database to pay plaintiffs less than the medical charge, and thus relates back to the original complaint.

III. ERISA

Liberty next contends that its case must be removed because the expanded class definition adds ERISA claims. Liberty argues that the addition of ERISA claims both commences a new action under CAFA, and provides grounds for removal to federal court under the complete preemption doctrine. The ERISA claims allegedly arise from two of Liberty's affiliates, Liberty Fire and Employers of Wausau, who issued group health policies as part of employee-benefit plans and used medical cost and utilization databases to reduce payments under those policies. Liberty claims that the expanded plaintiff class includes insureds under these plans, who will seek to recover benefits due to them under the terms of the plans.

The class certification order, however, neither adds ERISA claims nor presents a basis for complete preemption. The civil enforcement provision of *ERISA, Section 502(a)*, allows a plan participant or beneficiary to bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." *Section 502(a)* completely preempts state law causes of action that fall within the scope of that provision. *Moran v. Rush Prudential HMO, Inc., 230 F.3d 959, 967 (7th Cir. 2000)*

(quoting *ERISA, § 502(a)(1)(B)*). Considered in a vacuum, *Section 502(a)* appears to be implicated in the expanded class definition of "all insureds" of Liberty, its affiliates and subsidiaries. However, as Liberty bases its arguments for removal on the state court's class certification order, Liberty cannot look to the class definition while ignoring the state court's clear intent in the certification order. The class certification order must be read in its entirety, together with the class definition, to determine if removal is proper. The first paragraph of the state court's certification order and opinion shows that ERISA claims are not covered by the new class definition:

> This case involves a class action suit brought in connection with payments made by Liberty Insurance Company ('Liberty') pursuant to workers compensation and automobile policies allegedly issued by Liberty. Liberty's property and casualty policies obligate it to pay for all reasonable expenses for medical treatment related to covered occurrences.

(R. 22, Mot. to Remand, Ex. A, Sept. 29 Order at 1.)[5] Thus, in the first paragraph of her order and opinion, Judge Nowicki explained that the new class would only include insureds of "workers compensation and automobile policies," or "property and casualty policies." *Id.* Although the class definition says "all insureds," not excepting those insured under group health policies, neither Liberty, Plaintiffs, nor the state court ever contemplated ERISA claims. This is not an attempt at "artful pleading" by Plaintiffs to avoid a federal claim; rather, it is a creative attempt by Liberty to find another way into federal court. *Lehmann v. Brown, 230*

F.3d 916, 919 (7th Cir. 2000). While a claim to ERISA benefits necessarily arises under federal law, there is no claim to ERISA benefits here. *Id.* ("Courts look at substance, see the importance of federal law to recovery, and permit removal"). Indeed, a "mere simulacrum of a possible unasserted ERISA claim [is] insufficient to form a basis for federal jurisdiction." *Karambelas v. Hughes Aircraft Co., 992 F.2d 971, 975 (9th Cir. 1993)*.

CONCLUSION

For the reasons set forth above, Plaintiffs' Motion to Remand is GRANTED, and this case is remanded to state court based on lack of federal jurisdiction, in accordance with *28 U.S.C. § 1447(c)*. Section *28 U.S.C. § 1447(c)* makes an award of attorneys' fees "the norm" for improper removal. *Schorsch, 417 F.3d at 751*. In view of the history of the case, the Court will adhere to the norm and hereby awards reasonable attorneys' fees to Plaintiffs.

ENTERED:

Judge Ruben Castillo

United States District Court

Dated: December 13, 2005

Footnotes

n1 Contrary to Plaintiffs' arguments, Liberty's removal was timely. Although the amended class definition was first proposed on July 7, 2005, it was not certified until September 29, 2005, and Liberty removed two weeks later, on October 14, 2005. *See Sullivan v. Conway, 157 F.3d 1092, 1094 (7th Cir. 1998)* (Time for removal of

case began when state court judge granted plaintiff's motion to amend complaint to add federal claims, not when plaintiff made motion to amend).

n2 *See Pfizer, Inc., v. Lott, 417 F.3d 725 (7th Cir. 2005)*; *Schorsch v. Hewlett-Packard Co., 417 F.3d 748 (7th Cir. 2005)*; *Schillinger v. Union Pac. R.R. Co., 425 F.3d 330 (7th Cir. 2005)*.

n3 Although Illinois law supplies the rule of decision in this case, the Illinois and federal rules for relation back are "functionally identical." *Schorsch, 417 F.3d at 751*.

n4 Liberty also mistakenly relies on *Senterfitt v. SunTrust Mortgage, Inc., 385 F. Supp. 2d 1377 (S.D. Ga. 2005)*. In declining to find relation back when the plaintiff class was expanded from a four to twenty-year period, the Georgia district court specifically declined to follow the Seventh Circuit precedent in *Schorsch:* "I decline to follow *Schorsch* because it is not binding precedent and the Seventh Circuit's treatment of relation back in the context of increasing the size of a class action appears to differ from the Eleventh Circuit's approach." *Id. at 1379 n.3*.

n5 Liberty is correct that Plaintiffs cannot now stipulate to a limitation on the class; however, as the class was never broadened as Liberty alleges, such a stipulation would be redundant. *See Matter of Shell Oil Co., 970 F.2d 355, 356 (7th Cir. 1992)* (a post-removal stipulation or amendment limiting the plaintiff's claim does not authorize a remand).

No. 05-8037
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KIRSTEN KNUDSEN, CHRIS BAKER, and VIKKI BAKER,
Plaintiffs-Respondents,

v.

LIBERTY MUTUAL INSURANCE COMPANY,
Defendant-Petitioner.

February 22, 2006, Decided

NOTICE: RULES OF THE SEVENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

JUDGES: Before Hon. JOHN L. COFFEY, Circuit Judge, Hon. FRANK H. EASTERBROOK, Circuit Judge, Hon. DANIEL A. MANION, Circuit Judge.

OPINION: Order

Plaintiffs-Respondents filed a petition for rehearing and rehearing en banc on February 10, 2006. No judge in regular active service has requested a vote on the petition for rehearing en banc,* and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

Footnote

*Chief Judge Flaun and Judge Williams did not participate in the consideration of this petition.

Relevant Provisions Involved

United States Constitution, Amendment V:

No person shall...be deprived of life, liberty, or property, without due process of law....

28 U.S.C. Section 1332(d)(2)(A):

The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum of $5,000,000, exclusive of interests and costs, and is a class action in which ----

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant....

28 U.S.C. Section 1453(b) and (c):

(b) **In General.**----A class action may be removed to a district court of the United States in accordance with section 1446...without regard to whether any defendant is a citizen of the State in which the action is brought....

(c) Review of Remand Orders.----

(1) **In General.**----Section 1447 shall apply to any removal of a case under this section, except that...a court of appeals may accept an appeal from an order of the district court granting or denying a motion a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order.

Section 9 of Public Law No. 109-2 (CAFA):

The amendments made by this Act shall apply to any civil action commenced on or after the date of the enactment of this Act.

[CAFA was enacted February 18, 2005]

735 ILCS 5//2-201(a):

Commencement of actions----Forms of process. (a) Every action, unless otherwise expressly provided by statute, shall be commenced by the filing of a complaint....

735 ILCS 5/2-616(a), (b), (c) and (d):

Amendments. (a) At any time before final judgment amendments may be allowed on just and reasonable terms, introducing any party who ought to have been joined as plaintiff or defendant...which may enable the plaintiff to sustain the claim for which it was intended to be brought or the defendant to make a defense or assert a cross claim.

(b) The cause of action...set up in any amended pleading shall not be barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleadings that the cause of action asserted...in the amended pleading grew out of the same transaction or occurrence set up in the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of

some fact or some other matter which is a necessary condition precedent to the right of recovery or defense asserted, if the condition precedent has in fact been performed, and for the purpose of preserving the cause of action, cross claim or defense in the amended pleading, and for that purpose only, an amendment to any pleading shall be held to relate back to the date of the filing of the original pleading so amended.

(c) A pleading may be amended at any time, before or after judgment, to conform the pleadings to the proofs, upon terms as to costs and continuance that may be just.

(d) A cause of action against a person not originally named a defendant is not barred by lapse of time under any statute...limiting the time within which an action may be brought or right asserted, if all the following terms and conditions are met: (1) the time prescribed or limited had not expired when the original action was commenced; (2) the person, within the time that the action might have been brought or the right asserted against him or her plus the time for service permitted...received such notice of the commencement of the action that the person will not be prejudiced in maintaining a defense on the merits and knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him or her; and (3) it appears from the original and amended pleadings that the cause of action asserted in the amended pleading grew out of the same transaction or occurrence set up in the original pleading....For the purpose of preserving the cause of action under those conditions, an amendment adding the person as a defendant relates back to the date of the filing of the original pleading so amended.

735 ILCS 5/2-802(a):

Order and findings relative to the class. (a) Determination of Class. As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it may be so maintained and describe those whom the court finds to be members of the class. This order may be conditional and may be amended before a decision on the merits.

Fed. R. Civ. P. 15(c):

Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when

...

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth or attempted to be set forth in the original pleading; or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(j) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party....